ORIGINAL

(S E R V E D)
(February 25, 2002
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 02-03

EXCLUSIVE TUG ARRANGEMENTS IN
PORT CANAVERAL, FLORIDA

ORDER OF INVESTIGATION AND HEARING

On May 24, 2001, the Federal Maritime Commission ("Commission") commenced a non-adjudicatory fact finding investigation into the practices of the Port Everglades Department/Broward County Board of County Commissioners and the Canaveral Port Authority relating to exclusive tug arrangements in their respective ports.' During the course of this investigation, the tug monopoly which had existed in Port Everglades since 1958 was eliminated by the granting of a tug and towing franchise to a second tug company. However, the circumstances in Port Canaveral which prompted the Commission's fact finding investigation appear to be unchanged and warrant further Commission action.

The Canaveral Port Authority, a legal entity created by the State of Florida in 1953, operates as a marine terminal operator ("MTO") as that term is defined by section 3(14) of the Shipping Act of 1984, 46 U.S.C. app. § 1702(14) ("1984 Act"). The Commissionis chargedwith theresponsibility

'Fact Finding Investigation No. 24, Exclusive Tug Arrangements in Florida Ports, Order of Investigation served May 24,200 1.

of regulating the activities of MTOs under various sections of the 1984 Act, including section 10(d), 46 U.S.C. app. § 1709(d), which provides in pertinent part:

> (1) No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.
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> * * *
>
> (4) No marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.

Unlike most United States ports, Port Canaveral requires that prospective suppliers of various services, including tug services, obtain a franchise from the port in order to provide such services.[2] Since sometime in 1958, a single tug company has held a "non-exclusive" franchise to perform tug assist and towing services in Port Canaveral. That company is Seabulk Towing, Inc., dba Port Canaveral Towing ("Seabulk").[3]

In 1983, a second tug company, Petchem, Inc. ("Petchem"), obtained a contract from theU.S. government to provide tug and towing services for military vessels calling at Port Canaveral.[4] Petchem then applied to the Canaveral Port Authority for a franchise to perform commercial tug and towing services. Its application was denied in February 1984, and that denial was the subject of a complaint tiled with the Commission in August 1984. Ultimately, the Commission determined that

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[2]The Commission has been able to identify only two other U.S. ports with similar franchise requirements for tug services: Port Everglades, Florida, and Port Manatee, Florida.

[3]Prior to March 2001, the company was named Hvide Marine Towing, Inc., dba Port Canaveral Towing ("Hvide").

[4]The military facilities in Port Canaveral are located on government property which borders a turning basin which is separate from other port facilities and inaccessible to commercial or recreational vessels.

the Canaveral Port Authority's actions in denying Petchem's application did not violate the 1984 Act, on the basis of facts presented at that time.[5]

It appears that, until recently, Petchem remained at Port Canaveral, performing tug and towing services for military vessels under a series of contracts with the U.S. government. In December 1999, Petchem's contract to perform tug services for military vessels expired, and it applied for a second time to the Canaveral Port Authority for a franchise to perform tug and towing services for commercial vessels calling at the port. The Canaveral Port Authority denied Petchem's application at a hearing conducted by its Board of Commissioners on July 2 1, 2000. Subsequently, Petchem withdrew its tugs from Port Canaveral.

In June 2000, an application for a tug and towing franchise in Port Canaveral was filed by a third tug company, Tugz International, LLC ("Tugz International"), a member of the Great Lakes Group.[6] At its hearing on July 21, 2000, the Canaveral Port Authority Board of Commissioners determined to consider only the application of Petchem, and not that of Tugz International. The application of Tugz International was updated in September 2001, and is still pending.[7]:

Meanwhile, on April 1, 2001, the Canaveral Port Authority and Seabulk entered into an "Amended and Restated Franchise Agreement" which extended Seabulk's right to perform towing services in the port for another ten years. As with Seabulk's earlier franchises, this document

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[5] *Petchem, Inc. v. Canaveral Port Authority, et al., 23* S.R.R. 974 (1986), aff'd *sub nom. Petchem, Inc. v. FMC, 853* F.2d 958 (D.C. Cir. 1988).

[6] In addition to Tugz International, the Great Lakes Group consists of Admiral Barge and Towing Company, The Great Lakes Towing Company, and Puerto Rico Towing & Barge Co.

[7] The apparent refusal of the Canaveral Port Authority to consider this application is the subject of a separate Commission Order to Show Cause why such conduct is not in violation of section lO(b)(10) of the 1984 Act.

contains a commitment from the Canaveral Port Authority that it will not grant another non-exclusive franchise "without first having a public hearing showing a convenience and necessity therefore." [sic]

Exclusive arrangements such as the monopoly granted to Seabulk by the Canaveral Port Authority have been the subject of a number of Commission decisions and are generally viewed as contrary to this nation's pro-competitive policies.[8] Thus, in *Petchem, 23* S.R.R. 974, 988, the Commission stated:

> The exclusive arrangement between the Port Authority and Hvide is prima facie unreasonable because it is contrary to the general policies of the United States favoring competition, which fact obligates Respondents to justify the arrangement.

As the Commission has recognized, the 1984 Act, like its predecessor, the Shipping Act, 1916, does "not forbid all preferential or prejudicial treatment; only that which is undue or unreasonable." *Id.,* quotmg *A.P. St. Philip,* 13 F.M.C. at 174. After discussing its decision in *Agreement No. T-2598,* 17 F.M.C. 286, 14 S.R.R. 573 (1974), as an example of a successful justification of an exclusive arrangement between Port Canaveral and Eller and Company for terminal and stevedoring services, the Commission in *Petchem* announced:

> In sum, the appropriate standard for judging exclusive terminal arrangements under the Shipping Acts is a synthesis of the *St. Philip* and *Agreement T-2598* decisions. Such arrangements are generally undesirable and, in the absence of justification by their proponents, may be unlawful under the Shipping Acts. However, in certain circumstances, such arrangements may be necessary to provide

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[8] *See, e.g., California Stevedore and Ballast Co. v. Stockton Port District, 7* F.M.C. 75, 1 S.R.R. 563 (1962) (exclusive stevedoring contract found unlawful); *A.P. St. Philip, Inc. v. Atlantic Land & Improvement* Co. *et al.,* 13 F.M.C. 166, 11 S.R.R. 309 (1969) (exclusive tug contract found unlawful); *Agreement No. T-2598,* 17 F.M.C. 286, 14 S.R.R. 573 (1974) (exclusive stevedoring franchise justified); and *Petchem, supra* (exclusive tug franchise justified).

> adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services and generally to advance the port's economic well-being.

Id. 23 S.R.R. at 990.[9]

More recently, in Docket No. 96-06, *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation*, 28 S.R.R. 75 1,769 (1999), the Commission noted the continued relevance of its decision in *A.P. St. Philip,* indicating it is instructive "for an analysis of the extent to which the exclusive arrangement is monopolistic or otherwise harmful to competition in the relevant market." However, *Ormet* added that, "[t]o analyze whether an exclusive arrangement is *prima facie* unreasonable under the 1984 Act, the Commission must first determine the market relevant to the practice in question, and then must determine the degree of actual harm or harm likely to be caused by the practice within that market." *Id.* at 766. Once this *prima facie* hurdle is overcome, then the test used in *West Gulf Maritime Ass'n v. Port of Houston Auth.,* 21 F.M.C. 244, 18 S.R.R. 783 (1978), aff' d without opinion *sub nom. West Gulf Maritime Ass'n v. FMC,* 610 F.2d 100 (D.C. Cir. 1979), *cert.* denied, 449 U.S. 822 (1980), is applied, namely: "[T]he test of reasonableness as applied to terminal practices is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view." *Id.*

In addition, the test of reasonableness for a port's exclusive arrangements is in two parts: "whether the Port Authority's decision was reasonable at the time it was made and, even if so, whether it is still reasonable in light of its subsequent effects." *Petchem, 23* S.R.R. at 988. When

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'Notwithstanding that exclusive arrangements may be justified, under the analysis applied in *All Marine Moorings v. ITO Corp. of Baltimore,* 27 S.R.R. 539,545 (1996) (award of an exclusive contract for line handling at a terminal did not create a monopoly or anticompetitive condition and was not unreasonable), the Commission noted with approval the ALJ's observation that, "the greater the degree of preference or monopoly, the greater the evidentiary burden of justification."

the Commission found that the actions of the Canaveral Port Authority in denying Petchem's application in 1984 were reasonable, it relied on a number of factors that appear to have changed substantially. For example, Petchem was a new tug company in 1984, with no prior experience; Petchem's contract with the government contained certain commitments which may have interfered with its ability to provide service to commercial vessels; Hvide (now Seabulk) was precluded from performing the military work that it had done previously because of Petchem's contract and, as a result, was projecting financial losses in Port Canaveral;[10] no carriers or other maritime interests appeared in support of Petchem's application; and, in fact, one major user of tug services appeared in opposition to that application. *Petchem, 23* S.R.R. at 991.

When the Canaveral Port Authority considered Petchem's second application m July 2000, Petchem had seventeen years of experience as a tug operator in Port Canaveral, apparently without complaint. The contract with the government had expired, removing any possible conflicts with commercial tug demands. Hvide could, and apparently did, compete for military work after expiration of the government contract in December 1999. And several major users of tug services in Port Canaveral submitted letters of support for Petchem's application, as well as praise for its prior service."

The standard applied by the Canaveral Port Authority Board of Commissioners in determining whether to grant Petchem's second application was one of "convenience and necessity"

"Petchem had obtained the government contract under a Small Business Administration "set aside" which precluded Hvide from bidding on the contract because its total corporate revenues exceeded the established ceiling. Prior to 1984, Hvide had performed all military and commercial tug service in Port Canaveral. *Petchem, 23* S.R.R. at 978.

"Similarly, many of the factors upon which the Canaveral Port Authority relied in denying Petchem's application in 1984 would appear to have little relevance to the pending application of Tugz International.

which, as noted above, is found specifically in the series of franchise agreements between Hvide/Seabulk and the Canaveral Port Authority, and apparently arises out of Florida law empowering the Canaveral Port Authority:

> [t]o grant franchises to any person, firm or corporation to...operate...modern appliances for transportation of freight and the handling of passenger traffic...which the Port Authority may determine to be necessary, feasible and advantageous; and in connection with the operation, improvement and maintenance of said port, to perform all customary services...in the exercise of such franchise[12];

Under this standard, it appears that the Canaveral Port Authority based its denial of Petchem's second application almost entirely upon a belief that the demand for tug services in Port Canaveral would not support more than one tug company, and concomitantly, that the incumbent franchisee was providing sufficient equipment and adequate service.

Both the Commission and the appellate *court* in *Petchem* recognized that the decision to uphold the denial of Petchem's application in 1984 was based upon special circumstances existing at that time. Citing the Commission, the court offered guidance for the future as follows:

> The Commission was not condoning a regime of perrnanent, parallel monopolies. Rather, it viewed the decision to deny the application as dictated by temporary considerations of prudence.
>
> Were there any doubt as to the Commission's understanding of the basic objectives of the Shipping Acts, it has been put to rest by its observation that "even if the Port Authority continues to believe that an exclusive franchise for commercial work is necessary, it should consider carefully whether periodic competitive bidding for that franchise would be beneficial." *[Petchem]* at 995. As Petchem grows in experience, there is no reason to believe the company may not in

[12]Chapter 28922, Laws of Florida Special Acts of 1953 As Amended, Article IV, Section 6. Aside from this standard, there appear to be no other laws or regulations establishing the procedures to be followed or criteria to be used in making a determination that a franchise is "necessary, feasible, and advantageous" to the port.

> time qualify to be among the bidders. Although the Commission describes these comments as advisory, they confirm that the Shipping Acts do not favor exclusive arrangements except in special circumstances.

Petchem, Inc. v. *FMC, supra,* ***853*** F.2d at 965.

In view of the above, the Commission is of the opinion that an adjudicatory proceeding should be instituted to determine whether the Canaveral Port Authority is in violation of sections 1 O(d)(1) and/or 1 O(d)(4) of the 1984 Act by its various actions resulting in the continuation of a monopoly on tug and towing services for Seabulk. If so, this proceeding also shall determine whether civil penalties should be assessed and, if so, in what amount, and whether a cease and desist order should be issued.

NOW THEREFORE, IT IS ORDERED, Thatpursuant to sections 10(d)(l), 10(d)(4), 11, and 13 of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1709(d)(l), 1709(d)(4), 1710, and 17 12, an investigation is hereby instituted to determine whether the Canaveral Port Authority is violating or has violated sections 10(d)(l) and/or 10(d)(4) of the 1984 Act by failing to establish, observe and enforce just and reasonable regulations and practices relating to tug and towing services, and/or by giving an undue or unreasonable preference or advantage to Seabulk, or imposing undue or unreasonable prejudice or disadvantage with respect to other potential tug providers, including Petchem and Tugz International.

IT IS FURTHER ORDERED, That the Canaveral Port Authority is designated as Respondent in this proceeding.

IT IS FURTHER ORDERED, That in the event violations of the 1984 Act are found, this proceeding shall determine whether civil penalties should be assessed against the Respondent and, if so, in what amount.

IT IS FURTHER ORDERED, That in the event violations of the 1984 Act are found, this proceeding shall determine whether a cease and desist order should be issued against the Respondent.

IT IS FURTHER ORDERED, That a public hearing be held in this proceeding and that these matters be assigned for hearing before an Administrative Law Judge ("ALJ") of the Commission's Office of Administrative Law Judges at a date and place to be hereafter determined by the ALJ in compliance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.61. The hearing shall include oral testimony and cross-examination in the discretion of the presiding ALJ only after consideration has been given by the parties and the presiding ALJ to the use of alternative forms of dispute resolution, and upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matters in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record.

IT IS FURTHER ORDERED, That the Commission's Bureau of Enforcement is designated a party to this proceeding.

IT IS FURTHER ORDERED, That notice of this Order be published in the Federal Register, and a copy be served on each party of record.

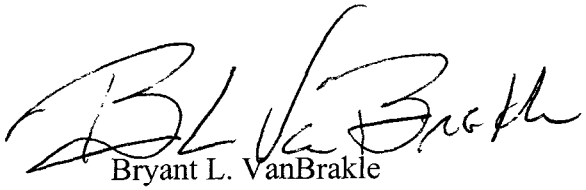
IT IS FURTHER ORDERED, That other persons having an interest in participating in this proceeding may file petitions for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.72.

IT IS FURTHER ORDERED, That all further notices, orders, and/or decisions issued by or on behalf of the Commission in this proceeding, including notice of the time and place of hearing or prehearing conference, shall be served on each party of record;

IT IS FURTHER ORDERED, That all documents submitted by any party of record in this proceeding shall be directed to the Secretary, Federal Maritime Commission, Washington, DC 20573-0001, in accordance with Rule 118 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.118, and shall be served on each party of record.

FINALLY, IT IS ORDERED, That in accordance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.61, the initial decision of the presiding ALJ shall be issued by February 25, 2003, and the final decision of the Commission shall be issued by June 25, 2003.

By the Commission



Bryant L. VanBrakle
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 02-03

EXCLUSIVE TUG ARRANGEMENTS IN
PORT CANAVERAL, FLORIDA

Notice of Investigation and Hearing

Notice is given that, on February 25, 2002, the Federal Maritime Commission ("Commission") served an Order of Investigation and Hearing ("Order") on the Canaveral Port Authority ("Port").

The Port requires prospective suppliers of various services, including tug services, to obtain a franchise from the port. Tugz International, LLC ("Tugz") filed an application for a tug and towing franchise in June 2000. At its July 21, 2000 hearing, the Port determined not to consider Tugz' application. Tugz' application was updated in September 2001, and is still pending. On April 1, 2001, the Port extended the right of Seabulk Towing, Inc., dba Port Canaveral Towing ("Seabulk") to perform towing services for another ten years.

This proceeding therefore seeks to determine whether the Port is in violation of sections 10(d)(1) and/or 10(d)(4) of the 1984 Act by its actions resulting in the continuation of Seabulk's monopoly. If so, this proceeding also shall determine whether civil penalties should be assessed and, if so, in what amount, and whether a cease and desist order should be issued.

Any person having an interest in participating in

this proceeding may a file petition for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.72.

Bryant L. VanBrakle
Secretary

02-03

2096, Vessel: ADVENTURE OF THE SEAS

Sea Cloud Cruises GmbH, Schiffahrts-Gesellschaft Hansa Columbus mbH & Co., KG, Hansa Shipmanagement GmbH & Co., Hansa Columbus Sailing Ltd., Valletta, and Hapag-Lloyd Kreuzfahrten GmbH, Ballindamm 17, 20095 Hamburg, Germany, Vessel: SEA CLOUD II

Star Clippers, Ltd., Star Clipper N.V., and Luxembourg Shipping Services S.A. (d/b/a Star Clippers), 4101 Salzedo Street, Coral Gables, FL 33146, Vessel: STAR CLIPPER

Dated: March 8, 2002.

Bryant L. VanBrakle,

Secretary

[FR Doc 02-6081 Filed 3–12–02; 8.45 am]

BILLING CODE 6736-61-P

FEDERAL MARITIME COMMISSION

Security for the Protection of the Public Indemnification of Passengers for Nonperformance of Transportation: Notice of Issuance of Certificate (Performance)

Notice is hereby given that the following have been issued a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation pursuant to the provisions of Section 3, Public Law 89-777 (46 U.S.C. 817 (e)) and the Federal Maritime Commission's implementing regulations at 46 CFR part 540, as amended:

The Delta Queen Steamboat Co., and Great River Cruise Line, L.L.C., 1380 Port of New Orleans Place, New Orleans. LA 70130. Vessel: DELTA QUEEN'

The Delta Queen Steamboat Co., and Great Ocean Cruise Line, L.L.C., 1380 Port of New Orleans Place, New Orleans, LA 70130, Vessel: MISSISSIPPI QUEEN

Holland America Line-Westours Inc. (d/b/a Holland America Line), HAL Cruises Limited, Holland America Line N.V.. and HAL Antillen N.V.. 300 Elliott Avenue West, Seattle, WA 98119, Vessels: OOSTERDAM, PRINSENDAM and ZUIDERDAM

Holland America Line-Westours Inc. (d/b/a Windstar Cruises), Wind Spirit Limited, and HAL Antillen N.V., 300 Elliott Avenue West, Seattle, WA 98119, Vessel: WIND SURF

Luxumbourg Shipping Services S.A. (d/b/a Star Clippers), 4101 Salzedo Street, Coral Gables, FL 33146, Vessel: STAR CLIPPER

Norwegian Cruise Line Limited (d/b/a Norwegian Cruise Line), 7665 Corporate Center Drive, Miami, FL 33126. Vessel: NORWEGIAN DAWN

Sea Cloud Cruises GmbH, Schiffahrts-Gesellschaft Hansa Columbus mbH & Co., KG, and Hapag-Lloyd Kreuzfahrten GmbH Ballindamm 17, 20095 Hamburg, Germany, Vessel: SEA CLOUD II

Dated. March 8, 2002.

Bryant L. VanBrakle.

Secretary.

(FR Doc. 02–6082 Filed 3–12–02; 8:45 am]

BILLING CODE 6736-61-P

FEDERAL MARITIME COMMISSION

[Docket No. 02–03]

Exclusive Tug Arrangements in Port Canaveral, FL; Notice of Investigation and Hearing

Notice is given that, on February 25, 2002, the Federal Maritime Commission ("Commission") served an Order of Investigation and Hearing ("Order") on the Canaveral Port Authority ("Port").

The Port requires prospective suppliers of various services, including tug services, to obtain a franchise from the port. Tugz International, LLC ("Tugz") filed an application for a tug and towing franchise in June 2000. At its July 21, 2000 hearing, the Port determined not to consider Tugz/ application. Tugz' application was updated in September 2001, and is still pending. On April 1, 2001, the Port extended the right of Seabulk Towing, Inc., dba Port Canaveral Towing ("Seabulk") to perform towing services for another ten years.

This proceeding therefore seeks to determine whether the Port is in violation of sections 10(d)(1) and/or 10(d)(4) of the 1984 Act by its actions resulting in the continuation of Seabulk's monopoly. If so, this proceeding also shall determine whether civil penalties should be assessed and, if so, in what amount, and whether a cease and desist order should be issued.

Any person having an interest in participating in this proceeding may file a petition for leave to intervene in accordance with Rule 72 of the Commission's rules of practice and procedure, 46 CFR 502.72.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 02-6077 Filed 3-12-02; 8:45 am]

BILLING CODE 6736-61-M

FEDERAL MARITIME COMMISSION

[Docket *No.* 02–02]

Canaveral Port Authority-Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate; Notice of Show Cause Proceeding

Notice is given that, on February 25, 2002, the Federal Maritime Commission ("Commission") served an Order to Show Cause ("Order") on the Canaveral Port Authority ("Port").

It appears that the Port has refused to consider the application of Tugz International LLC ("Tugz") for a franchise to perform tug and towing services. This refusal appears to have the effect of preventing competition and of maintaining a monopoly for the single tug company in the port,

The Order directs the Port to show cause why it should not be found in violation of section 10(b)(10) of the 1984 Act, 46 U.S.C. app. sec. 1709(b)(10), for its refusal to consider Tugz' application.

The Order's full text may be viewed on the Commission's homepage at *http://www.fmc.gov.* or at the Office of the Secretary, Room 1046,800 N. Capitol Street, NW., Washington, DC. Any person having an interest and desiring to intervene in this proceeding shall file a petition for leave to intervene in accordance with Rule 72 of the Commission's rules of practice and procedure, 46 CFR thnsp;502.72 and the procedural schedule set forth in the Commission's February 25 Order.

Bryant L. VanBrakle,

Secretary,

[FR Doc. 02–6078 Filed 3–12–02; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as Non-Vessel Operating Common Carrier and Ocean Freight Forwarder-Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. app. 1718 and 46 CFR part 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.